IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,
Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC., ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC., DAVID G. LILLY CO., INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE A MOTION AMICUS CURIAE AND MOTION TO POSTPONE ORAL ARGUMENT ON BEHALF OF SEARS, ROEBUCK AND CO.

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

ALAN RAYWID
Cole, Zylstra & Raywid
2011 Eye Street, N. W.
Washington, D. C. 20006

Attorneys for Sears, Roebuck and Co.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,

Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC., ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC., DAVID G. LILLY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE A MOTION AMICUS CURIAE ON BEHALF OF SEARS, ROEBUCK AND CO.

Sears, Roebuck and Co. respectfully moves for leave to file a motion, as *amicus curiae,* to postpone oral argument and consideration of the instant case pending the decision of the District of Columbia Court of Appeals on the pending petition for rehearing in *Sears, Roebuck and Co.* v. *National Labor Relations Board,* ..... F. 2d ....., 81 LRRM 2481 (D. C. Cir. Oct. 24, 1972), *pet. reh. pend.* In support of this motion, Sears states:

In *Sears*, the District of Columbia Circuit, after finding jurisdiction on the basis of its decision in the instant case, held that there was an insufficient showing of irreparable harm, notwithstanding the National Labor Relations Board's failure to provide public documents under the Freedom of Information Act, 5 U. S. C. § 551, to warrant enjoining pending Board proceedings. In effect, the Court of Appeals, in contrast to the Solicitor General's assertion in his petition for certiorari in this case (p. 9)—that Renegotiation Board and N. L. R. B. proceedings are identical for purposes of the issues here involved—carved out an exception to its decision in the present case for Labor Board matters; the irreparable harm determination in *Sears* is a virtually insurmountable barrier to forestalling determinative N. L. R. B. action until relevant information, which is required to be made available promptly under the Act, is provided. Sears originally sought to bring the pendency of *Sears* to the Court's attention by filing a motion for leave to file an *amicus* brief and, attached thereto, a brief in support of the Solicitor General's petition for certiorari. See Exhibit A hereto. Therein, Sears suggested that consideration of the Solicitor General's petition be deferred until the expected imminent resolution of the request for rehearing in *Sears*, filed on November 6, 1972, and, in the event of an adverse decision, a reasonable opportunity to submit a petition for certiorari therefrom. Prior to the distribution of this motion and brief to the Court, however, the petition for certiorari was granted. Sears now seeks to renew its request, and, accordingly, if granted leave to file a motion, will demonstrate why, in order to resolve all aspects of the question here presented, this Court should determine the present case in conjunction with *Sears*.

For the foregoing reasons, Sears respectfully requests leave to file its annexed motion.

Respectfully submitted,

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

ALAN RAYWID
Cole, Zylstra & Raywid
2011 Eye Street, N. W.
Washington, D. C. 20006
Attorneys for Sears, Roebuck and Co.

March 9, 1973.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,

Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC., ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC., DAVID G. LILLY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO POSTPONE ORAL ARGUMENT ON BEHALF OF SEARS, ROEBUCK AND CO.

Contingent upon the Court's granting the foregoing motion for leave to file a motion *amicus curiae*, Sears, Roebuck and Co. moves this Court to postpone oral argument and consideration of the instant case pending resolution of the petition for rehearing now awaiting decision before the District of Columbia Court of Appeals in *Sears, Roebuck & Co.* v. *National Labor Relations Board*, ____ F. 2d ____, 81 LRRM 2481 (D. C. Cir. Oct. 24, 1972), *pet. reh. pend.*

The interest of Sears is set forth in its annexed motion for leave to file a motion *amicus curiae*. In support of the instant motion, Sears states:

On January 22, 1973, this Court granted *certiorari* in the instant matter to decide whether a federal district court has jurisdiction to enjoin administrative proceedings when the agency fails to provide information in a timely manner under the Freedom of Information Act, 5 U. S. C. § 552 (hereafter the "Act"). An integral part of this significant question is now pending, by reason of the petition for rehearing in *Sears*, before the District of Columbia Court of Appeals—the threshold standard of irreparable harm. Two choices are before the court of appeals: (1) the traditional measure of economic harm followed in *Sears* by a two-judge panel irrespective of the effect of delay upon the right to prompt disclosure contemplated by the Act;[1] or (2) the standard, submitted by Sears, that where (a) no private party objects to enjoining the underlying administrative proceeding, (b) there is no attempt to delay the process of law enforcement, and (c) the agency involved can provide no special reason barring the issuance of an injunction, denying prompt disclosure under the Act must, *as a matter of law*, constitute the requisite irreparable harm.[2] This Court, should

1. In *Sears*, a two judge panel of the Court of Appeals reiterated the jurisdiction it has conferred in this case; recognized that the prompt disclosure of the documents requested by Sears might be of "significant help" to the Company in the underlying administrative proceeding and would not disadvantage any other party thereto; but nevertheless determined that the Labor Board's denial of such "help" was not sufficient to warrant upholding the injunction of such proceedings which had been granted by the District Court.

2. Sears submits that the latter standard is necessary to effectuate what this Court recently stated to be "judicially enforceable rights" (*Environmental Protection Agency, et al.* v. *Mink, et al.*, 41 L. W. 4201, 4205 (Jan. 23, 1973)). Cf. *Gomez* v. *Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1969). The former

it affirm the decision of the court below, will necessarily be confronted with the same question in delineating the extent of a district court's equitable jurisdiction. Consequently, in order to insure that the issue is fully developed by the Court of Appeals before being presented to this Court, Sears respectfully requests that the instant proceeding be postponed until such time as that Court completes its reconsideration of *Sears* and, should that decision be adverse, there is an opportunity to submit a petition for certiorari therefrom.

Where, as here, a case before the Court is intimately related to a pending proceeding before a lower court and both cases are of equal significance, a postponement is appropriate. See *Red Lion Broadcasting Co.* v. *F. C. C.*, 390 U. S. 916 (1968).[3] Such action would, in this instance, insure that the Court's time is not misspent by providing for the resolution of the entire controversy, and allow, by means of the petition for rehearing in *Sears*, the full Court of Appeals to explicate its opinion in the instant case. Accordingly, in view of the imminent resolution of *Sears*, the

---

criterion totally disregards the recent conclusion of a House Study on the operation of the Act: that the major impediment to "the efficient operation" of the Act has been "foot-dragging" and "delay" on the part of administrative agencies. Administration of the Freedom of Information Act, H. R. Rep. No. 92-1419, 92d Cong. 2d Sess. (Sept. 20, 1972), pp. 10, 74 and 82-3. Systematic denials of prompt disclosure were thus observed to "result in substantive damage to the plaintiff's case" rendering "totally useless" the eventual disclosure of this "perishable commodity." *Id.* p. 74.

3. In *Red Lion*, this Court, after denying a petition for certiorari *before judgment*, stayed proceedings pending the disposition of *Radio Television News Directors Ass'n.* v. *U. S.*, 400 F. 2d 1002 (7th Cir. 1968), and thereafter, upon receiving a petition for certiorari in the latter case, consolidated the two cases. *U. S.* v. *Radio Television News Directors, et al.*, 393 U. S. 1041 (1969), and see *Red Lion Broadcasting Co., Inc., etc., et. al.* v. *F. C. C.*, 395 U. S. 367 (1969). In the circumstances of this case, however, should certiorari before judgment in *Sears* be deemed by this Court a preferable procedure in order to avoid delay, Sears would be willing to submit the appropriate petition.

administration of justice will be best served by a short postponement.

For the foregoing reasons, Sears respectfully requests that the oral argument in the instant action be postponed.

Respectfully submitted,

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

ALAN RAYWID
Cole, Zylstra & Raywid
2011 Eye Street, N. W.
Washington, D. C. 20006
Attorneys for Sears, Roebuck and Co.

March 9, 1973.

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972.

No. 72-822.

THE RENEGOTIATION BOARD,

Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC., ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC., DAVID G. LILLY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF SEARS, ROEBUCK AND CO.

This brief *amicus curiae* is filed on behalf of Sears, Roebuck and Co. contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of Sears is set forth in its annexed motion for leave to file a brief *amicus curiae.*

Reasons for Granting the Writ

1. Sears agrees with the Solicitor General that the question here presented is an important one which warrants review by this Court. The Freedom of Information Act was intended, through a "liberal disclosure requirement," to "increase the citizen's access to government records."[1] Both the failure to provide access at a meaningful date, as well as the failure to provide access altogether, may frustrate this objective. Proceedings under the Act, accordingly, are required to be "expedited in every way." 5 U. S. C. § 552(a)(3). Nevertheless, one of the major impediments to "the efficient operation" of the Act has been "foot-dragging" and "delay" on the part of administrative agencies.[2] This was the problem the court below confronted in the instant case. It recognized that, in the normal instance where an agency is required to make information available, it will do so with reasonable dispatch. Where, however, as the result of a dispute over the Act's coverage or for other reasons, information is not made promptly available, since such information is "likely to be a perishible commodity", any significant delay "may result in substantive damage to the plaintiff's case" and render the information sought "totally useless."[3] Even where this result occurs, there is, of course, no automatic right to equitable relief. There must always be a careful balancing of all interests. The only issue here involved, however, is whether, where there has been the requisite

1. See, e.g., *Getman* v. *N. L. R. B.*, 450 F. 2d 670, 672 (D. C. Cir. 1971); *Tennessean Newspapers, Inc.* v. *Federal Housing Admin.*, 464 F. 2d 657 (6th Cir. 1972); *Bristol-Myers Company* v. *F. T. C.*, 424 F. 2d 935, 938 (D. C. Cir. 1970), *cert. den.*, 400 U. S. 824 (1970); and *Hawkes* v. *I. R. S.*, 467 F. 2d 787, 791 (6th Cir. 1972).

2. *Administration of the Freedom of Information Act*, H. R. Rep. No. 92-1419, 92d Cong. 2d Sess. (Sept. 20, 1972), pp. 10, 74 and 82-3.

3. *Id.* at 74.

showing of irreparable injury, probable success on the merits and absence of countervailing considerations, a district court may then invoke its power to issue all writs necessary to effectuate its jurisdiction[4] to achieve a " 'common sense solution' . . . to 'do complete justice . . .' " *Morrow* v. *District of Columbia*, 417 F. 2d 728, 738 (D. C. Cir. 1969). In order to avoid a severe dislocation in the effectuation of the purposes of the Freedom of Information Act, it is submitted, this Court should affirm that the federal judiciary does, in fact, have this equitable authority.

2. The Sixth Circuit's decision in *Sears, Roebuck and Co.* v. *N. L. R. B.*, 433 F. 2d 210 (6th Cir. 1970), is not to the contrary. In that case, the court found that "the form of relief which the plaintiff seeks would result in early judicial review of a Board decision on permissible discovery, not an order to produce records." 433 F. 2d at 211. The instant case, by contrast, does not involve any attempt to review administrative decisional processes. Similarly, in *Sears, Roebuck and Co.* v. *N. L. R. B.*, ___ F. 2d ___, 81 LRRM 2481 (D. C. Cir. Oct. 24, 1972), *pet. reh. pend.*, where the issue was whether N. L. R. B. proceedings should be enjoined until the Board disclosed information sought by a charging party to permit his more effective participation in his own pending unfair labor practice case, there was no effort to obtain an appellate ruling as to the merits of any ruling by the Board. The issue in both instances was limited to the obligation to provide information under the Freedom of Information Act; enjoining administrative processes was only a necessary ancillary means to permit that question to be resolved in a meaningful context. In such a case, it is submitted, the controlling

4. See, e.g., the authorities noted by the court below at App. A of the Petition, pp. 14a-15a; *Eastern Greyhound Lines* v. *Fusco*, 310 F. 2d 632, 634 (6th Cir. 1962); *Morrow* v. *District of Columbia*, 417 F. 2d 728, 737-738 (D. C. Cir. 1969); and *Nader* v. *Volpe*, 466 F. 2d 261, 269 (D. C. Cir. 1972) and the cases therein at n. 54.

precedent is *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557 (1919), where district courts were held to have jurisdiction to restrain agency action where, *inter alia,* there is "no *effective* way of presenting the claim of invalidity at a later date." (emphasis added.) See also *Jewel Companies, Inc.* v. *F. T. C.,* 432 F. 2d 1155 (7th Cir. 1970).

3. The present Sears case presents an important aspect of the jurisdictional issue raised in *Bannercraft:* what showing of irreparable injury to a plaintiff is required under the Freedom of Information Act to warrant enjoining administrative proceedings. If the standard is that of the traditional injunction case, the impact of the present case will be severely restricted. The denial of the right to prompt disclosure must, as a matter of law, be deemed to constitute an irreparable injury. In such a situation, where there is no countervailing harm to other interests, issuance of a preliminary injunction is the appropriate and, in fact, the only means available to enforce a significant statutory right. Cf. *Gomez* v. *Florida State Employment Service,* 417 F. 2d 569 (5th Cir. 1969). The irreparable harm issue in *Sears,* in short, is, in view of the acknowledged absence of material difference between Renegotiation Board and N. L. R. B. proceedings (*pet. for cert.,* p. 9), inseparable from the *Bannercraft* jurisdictional issue. It is for this reason that, in the event its request for rehearing is denied, Sears intends to seek certiorari from this Court and will also move to consolidate that petition with the instant petition. It is for that reason also, as well as to afford the Court with a desirable vehicle to consider all aspects of the question presented, that Sears respectfully suggests that consideration of the instant petition be deferred until such time as the District of Columbia Court of Appeals resolves the request for rehearing in *Sears* and, should that decision be adverse, there is an opportunity to submit a petition for certiorari therefrom. See *Red Lion Broadcasting Co.* v. *F. C. C.,* 390 U. S. 916 (1968).

Conclusion

For each of the foregoing reasons Sears respectfully requests that this Court grant the Petition for Certiorari or, in the alternative, defer consideration of the instant petition pending resolution of Sears' Petition for Rehearing before the District of Columbia Court of Appeals in *Sears, Roebuck and Co.*, v. *N. L. R. B. supra.*

Respectfully submited,

Gerard C. Smetana
925 South Homan Avenue
Chicago, Illinois 60607

Lawrence M. Cohen
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

Alan Raywid
Cole, Zylstra & Raywid
2011 Eye Street, N. W.
Washington, D. C. 20006

Attorneys for Sears, Roebuck and Co.

No. 72-822

In the Supreme Court of the United States

OCTOBER TERM, 1972

THE RENEGOTIATION BOARD, PETITIONER

v.

BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RENEGOTIATION BOARD

ERWIN N. GRISWOLD,
Solicitor General,

HARLINGTON WOOD, JR.,
Assistant Attorney General,

HARRIET S. SHAPIRO,
Assistant to the Solicitor General,

WALTER H. FLEISCHER,
WILLIAM D. APPLER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.